In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF
RESTON, VIRGINIA HOMEOWNERS,
Petitioners,

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

BRIEF ON BEHALF OF RESPONDENT VIRGINIA STATE BAR

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

STUART H. DUNN
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond Virginia 23219

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

In The

Supreme Court of the United States

October Term, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF
RESTON, VIRGINIA HOMEOWNERS,
Petitioners,

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

BRIEF ON BEHALF OF RESPONDENT VIRGINIA STATE BAR

QUESTIONS PRESENTED[1]

1. **Whether The Action Of The Virginia State Bar, An Administrative Agency Of The Supreme Court Of Virginia, In Distributing Minimum Fee Reports And In Issuing Opinions With Respect To Ethical Conduct Of Attorneys, Constitutes "State Action" Exempt From Federal Antitrust Laws?**

2. **Whether The Virginia State Bar, An Administrative Arm Of The Virginia Supreme Court, Is Immune From Suit On Account Of The Eleventh Amendment Of The United States Constitution?**

[1] To avoid unnecessary repetition this brief wil not address all of the questions presented although the other issues in this case apply with equal force to the State Bar. Rather, we will rely upon the arguments presented by the Respondent Fairfax Bar.

STATEMENT OF THE CASE

Respondent, Virginia State Bar, agrees substantially with the statement of the case by the Goldfarbs. To the extent that it disagrees, these matters will be addressed in argument.

Additionally, the following facts are pertinent to a consideration of the nature of the Virginia State Bar, although they are inclusive of some previously stated by petitioners.

The State Bar is an administrative agency of the Supreme Court of Virginia created by the Supreme Court of Virginia pursuant to the laws of Virginia, including § 54-49, Code of Virginia (1950), as amended. The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operations of the State Bar which are found in §§ II and IV of Part VI of the Rules of the Supreme Court (Stip. 9; App. A, p. 17[2]).

The powers of the State Bar have been delegated to the Council of the State Bar, which is comprised of one or more[3] persons from each judicial circuit in Virginia, six persons appointed at large by the Supreme Court of Virginia and the president, president-elect and immediate past president all of whom serve as *ex officio* members (Stip 10; App. A, pp. 17-18).

Each attorney practicing law in Virginia is required by statute and by court rule to be a member of the State Bar. The State Bar is required by statute and rule to investigate alleged violations of the standards of conduct mandated by the Supreme Court Rules, and to report its findings to a

---

[2] References to the appendices accompanying the petition will be designated "App. ....., p. ....." References to the single Appendix will be designated "A. ....."

[3] Since the institution of this action, there has been a minor amendment of the Rules, which is not pertinent to the issues in this case.

court of appropriate jurisdiction for any disciplinary proceedings (Stip. 11; App. A, p. 18).

The Supreme Court has delegated to the State Bar responsibility for investigating complaints of unprofessional conduct of any member of the State Bar. Such investigations are carried out by district committees which are comprised of attorneys. There is such a committee organized in each of the ten congressional districts of Virginia (Stip. 22; App. A, p. 20).

Pursuant to § 54-52 of the Code, the funds for operation of the State Bar are appropriated from a special fund of the State Treasury by act of the General Assembly. The special fund in the State Treasury consists of fees paid by members of the State Bar, the amounts of which are set, pursuant to statute, by the Supreme Court (Stip. 12; App. A, p. 18). The General Assembly has established the limit of such fees (§ 54-50).

The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on matters involving questions of ethics (Stip. 16; App. A, p. 19). The Supreme Court of Virginia has stated that suggested fee schedules and economic reports of the State Bar and of local bar associations involve questions of ethics (Stip. 18; App. A, p. 19). The State Bar has been given authority by the Supreme Court of Virginia to issue opinions on questions of ethics, such as Opinions 98 and 170, which relate to minimum fee schedules, and to disseminate minimum fee schedule reports (tip. 19; App. A, p. 19).

In promulgating Opinions 98 and 170, the Council of the State Bar stated that an attorney who ". . . *habitually* charges less than the suggested minimum fee schedule adopted by his local Bar association, raises a presumption that such lawyer is guilty of misconduct . . . ." (Emphasis in original.)

In 1962 and 1969, attorneys who were members of the State Bar prepared on behalf of the State Bar minimum fee schedule reports (Stip. 14; App. A, p. 18). At the time of the initiation of this suit minimum fee schedules of some type were published and circulated in at least thirty-four states and in the District of Columbia either by the voluntary bar or by a counterpart of the State Bar (Stip. 26; App. A, p. 20).

The State Bar has never received a communication from the respondent local bar association regarding the professional conduct of any member of said association or any member of the State Bar, including failure of such members to follow a minimum fee schedule (Stip. 24; App. A, p. 20). The State Bar has never received a communication from any person regarding the professional conduct of any member of the State Bar with respect to minimum fee schedules (A. 70). The State Bar has never initiated or participated in any administrative or judicial action against an attorney for failure to adhere to a minimum fee schedule (Stip. 25; App. A, p. 20).

Virginia attorneys who provided legal services to prospective home buyers in Reston, Virginia, are specifically prohibited by the Code of Professional Responsibility promulgated by the Supreme Court of Virginia from advertising their services or their charges for these services either within or without the State of Virginia (Stip. 23; App. A, p. 20).

SUMMARY OF ARGUMENT

1. In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Court stated that the Sherman Act was not intended by Congress to restrain actions by a state or its officers or agents. While the fact that there is "State action" does not automatically confer antitrust immunity upon a person or corporation, the

State agency directing such action is immune. This is true whether the State action is directed by the legislature or the judiciary.

2. The Code of Virginia authorizes the Supreme Court of Virginia to organize the Virginia State Bar as the administrative agency of the Court for the purpose of investigating and reporting violations of the Court's rules. The Code further authorizes the Court to adopt rules prescribing a code of ethics. Even apart from the statutory authorization, the Court would have the inherent power to regulate the practice of law. The Supreme Court of Virginia pursuant to statutory and inherent authority adopted the Code of Professional Responsibility. The Code provides that an attorney shall not charge an excessive fee and that in the determination of his fee he should consider, *inter alia*, suggested fee schedules.

The Virginia State Bar has taken two actions which form the basis for the complaint here. First, it has promulgated two opinions which essentially hold that the *habitual* charging of less than the suggested minimum fee raises a presumption that a lawyer is guilty of misconduct. Second, suggested minimum fee reports were circulated in 1962 and 1969, which could be used as the basis for local minimum fee schedules. In both these actions the Bar was carrying out its legal duties.

In the rendering of opinions as to ethical conduct the Bar was fulfilling its legal responsibilities. Further, in circulating suggested minimum fee reports the Bar was providing attorneys with the guidance necessary to aid them in avoiding a violation of the Code of Professional Responsibility. While the State Bar may conceivably have some private functions, the actions taken here are clearly governmental.

Minimum fee schedules have an important role in the application of the Code of Professional Responsibility. A high fee obviously harms the client; a low fee may do so as well. If an attorney's fee is lower than that which permits him to earn an adequate income, he is likely to cut his costs by failing to maintain an adequate library or continue his legal education. Further, this is a method of solicitation which has been universally condemned throughout the history of the regulation of the practice of law.

3. The Virginia State Bar enjoys the sovereign immunity of the Commonwealth of Virginia. The Court has held on numerous occasions that a waiver of sovereign immunity will be found only where explicitly stated by Congress. All the evidence is to the contrary with respect to the reach of the Sherman Act to the actions of a State agency.

For the reasons previously stated, the State Bar is manifestly a State agency for the purposes of the actions which are complained of here. In rendering opinions as to ethics and circulating suggested minimum fee reports, the State Bar is the *alter ego* of the Supreme Court of Virginia.

That the Virginia State Bar is a State agency is not a position conveniently adopted for the purposes of this law suit. As far back as 1944, the Attorney General ruled that the Virginia State Bar was an agency of the Commonwealth. Further, the Attorney General is permitted to represent only State agencies or officers, not private individuals or entities.

The argument of the United States that the funds of State Bar are not State funds manifests a lack of knowledge as to State financing. The State Bar is only one of many agencies who receive their funds other than by general appropriation. The expenditures of such special funds are regulated by State law and are no less "State funds."

ARGUMENT

I.

The Actions Of The Virginia State Bar In Publishing Minimum Fee Reports And Circumscribing Conduct Of Attorneys With Regard To Adherence To Local Minimum Fee Schedules By Means Of Ethical Opinions Constitute "State Action" Exempt From Federal Antitrust Laws.

A.

PARKER V. BROWN

The seminal case with respect to "state action" is *Parker* v. *Brown*, 317 U.S. 341 (1943). The case involved an interpretation of the applicability of the Sherman Act to the actions of a State agency. The following language is instructive:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351.
>
> * * *
>
> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'" 317 U.S. at 351.
>
> * * *
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (Citation omitted.) 317 U.S. at 352.

As far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act. *Lowenstein* v. *Evans*, 69 F. 908 (C.C.D.S.C. 1895). The Court subsequent to *Parker* had another opportunity to consider the "state action" exemption to the Sherman Act. In *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), it was held that efforts to restrain trade by obtaining passage of laws was "state action" within the meaning of *Parker*. Therein the Court stated:

> ". . . [T]he Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where restraint upon trade or monopolization is a result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 135-136.

Finally, the Court has held in *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), that the *Noerr* concept extended to the actions of a labor union and certain large coal producers in attempting to influence the Secretary of Labor to set a minimum wage in the industry so high as to drive out small producers. The common thread weaving its way through *Parker*, *Noerr* and *Pennington* is that the State cannot be held responsible for violation of the Sherman Act.

Typically, the cases in which the *Parker* defense has been asserted, have been suits by competitors against businesses regulated by the State in some manner, *e.g.*, *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F.2d 248 (4th Cir. 1971); *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968) *cert. denied*, 393 U.S. 1000 (1968), or against busi-

nesses which have attempted to have governmental action taken which would restrain trade in some manner, *e.g. Noerr, supra; George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

In the former cases the issue has usually been whether there was sufficient regulation or in fact whether there was a governmental agency involved, *e.g. Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 263 F.2d 502 (4th Cir. 1959). In those cases where insufficient regulation was found, the immunity of the state was found not to be conferred upon the private businesses acting under the state's direction.

In the latter cases, *i.e.* where the government is often a party to the action complained of, if not to the suit, the courts have almost without exception found, not only that the government was immune, but that its immunity extended to the private parties, *see e.g. Okefenokee Rural Electric Municipal Corp.* v. *Florida Power and Light Co.*, 214 F.2d 413 (5th Cir. 1954); *United Mine Workers of America* v. *Pennington, supra.* This is true even where the government is an active party in the conspiracy, *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), or where the governmental agent acted outside of his authority. *Parmalee Transportation Co.* v. *Keeshen*, 292 F.2d 794 (7th Cir. 1961); cf. *Harman* v. *Valley Nat'l. Bank*, 339 F.2d 546 (9th Cir. 1964).

Only two cases have been found which even arguably support the position that a state can be liable under the Sherman Act. In *Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047 (1972), the Court of Appeals for the District of Columbia held that Congress in enacting the District of Columbia Stadium Act did not

intend to provide an exception to antitrust laws. Although the case involved only an interpretation of two federal statutes, the language of the opinion would suggest that a similar analysis might be applied to a State agency. Little can be gleaned as to the financial or governmental structure of the D. C. Armory Board so as to provide a comparison with the State Bar. Further, the opinion was specifically rejected by the Court of Appeals for the Ninth Circuit in *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974).

The second case is *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011 (3rd Cir. 1971), wherein a declaratory judgment and injunctive relief were sought that the Virgin Islands Fair Trade law violated the Sherman Act. There is nothing to indicate what, if any, defenses were raised by the Virgin Islands administering Board. In fact, the Board did not even join in the appeal from the District Court. This case is a slender reed upon which to base the argument that a state or one of its agencies can violate the Sherman Act since it is unknown if the issue was even raised.

As to any arguable distinctions between legislative and judicial authority, District Judge Bryan's opinion is responsive:

> "The rationale behind the holding of *Parker* v. *Brown, supra*, that the Sherman Act restrains only actions of private persons and not state action, applies equally to both a state's judicial actions and its legislative actions. Whatever force or efficacy the Virginia State Bar had in rendering opinions and supplying the enforcement machinery for violations of ethical conduct is derived from the judicial and 'legislative command of the State and was not intended to operate or become effective without that command.'" (App. A, p. 6).

B.

THE VIRGINIA STATE BAR

The actions of the Virginia State Bar with respect to the subject matter of this suit do not fall neatly into the categories of any of the previous cases. It does not serve the function of a corporation commission in setting rates; and yet, it clearly has the power to regulate the legal fees to be charged through the rendering of ethical opinions, a duty imposed by statute. At the same time it is not acting as a party to any unlawful agreement or combination. While it published fee reports, this is clearly a very incidental part of the action complained of in that they are not binding, but are mere guidelines for localities and in fact, were not adopted in their entirety by the Fairfax County Bar Association, even as to the title examination fees.[4] It is further significant that in rendering the opinions complained of and in publishing the minimum fee reports, the State Bar is carrying out its statutory responsibility; it is not acting in a commercial or proprietary capacity.

The conduct of this defendant which was alleged to have contributed to the "conspiracy" in restraint of trade, is with respect to its role in enforcement of the Code of Professional Responsibility as promulgated by the Supreme

[4] A comparison of page 11 of the Virginia State Bar minimum fee schedule report of 1969 (Exh. 27; A. 26) with page 25 of the Fairfax Bar Association minimum fee schedule of 1969 (Exh. 29; A. 34) reveals (a) that there is a minimum title examination fee of $100 under the Fairfax schedule while there is a minimum fee for title examination of $75 under the State Bar report, (b) the Fairfax report provides for a fee of one-half of one percent of the amount of loan or purchase price, whichever is greater, from $50,000 to $100,000 and one quarter of one percent of the loan amount or purchase price, whichever is greater, from $100,000 to $1,000,000, while the State Bar report provides for a fee of one-half of one percent of the loan amount or purchase price from $50,000 to $250,000 with any amount over $250,000 of loan amount or purchase price to be reached by negotiation or agreement.

Court of Virginia. This role in fact is restricted to investigating complaints and reporting violations of the rules of ethicsc of the Court to courts of competent jurisdiction for disciplinary action. Section 54-49 of the Code of Virginia (1950), as amended, provides:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof and in good standing."

It is significant that the State Bar has no authority to impose any sanctions on any attorney who violates such rules and regulations. Rather, it must seek action in the courts (See §§ 54-51, 54-74).

The Supreme Court of Virginia has been given authority by the General Assembly to prescribe a code of ethics and disciplinary procedures with respect to the practice of law. Section 54-48 of the Code of Virginia (1950), as amended, reads as follows:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> "(a) Defining the practice of law.
>
> "(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

> "(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law."

Irrespective of statute, the Supreme Court enjoys the inherent power to regulate the practice of law. *Button* v. *Day,* 204 Va. 547, 132 S.E.2d 292 (1960). The activity complained of, then, is action by the Supreme Court of Virginia through its "administrative agency" (see § 54-49), the Virginia State Bar.

In 1970, the Supreme Court of Virginia amended its rules by substituting a new Code of Professional Responsibility for the 47 Canons of Professional Ethics, 211 Va. 295. EC 2-18 reads in relevant part as follows:

> "The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. *Suggested fee schedules* and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees."[5] (Emphasis supplied.)

In promulgating DR 2-106(A) the Supreme Court of Virginia prohibited an attorney from charging a "clearly excessive fee." Further, in promulgating DR 2-106(B)(3) the Supreme Court established "the fee customarily charged in the locality for similar legal services" as one of the criteria by which the reasonableness of a fee may be determined. Clearly, the State Bar has the right, if not the *duty,* to provide attorneys with some guidelines by which reasonableness of fees can be judged. The minimum fee reports circulated in 1962 and 1969 serve such a purpose.

[5] Canon 12 of the Canons of Professional Ethics specifically provided for the use of minimum fee schedules in determining the customary charges for legal services. 171 Va. xvii, xxiii.

The United States argues (Brief, p. 45) that the State Bar acted in a "private" capacity when it circulated suggested minimum fee schedule reports and also when it determined through Opinions 98 and 170, that habitual failure to adhere to such schedules raised a presumption of unethical conduct. In view of the fact that suggested fee schedules are specifically referred to in ethical rules adopted by the Supreme Court of Virginia and further in view of the fact that the State Bar is required by law to render opinions on ethical conduct, such assertion is invalid. Conceivably, the State Bar is wrong in stating that habitual failure to follow minimum fee schedules raises a presumption of unethical conduct. Most assuredly, however, it acts in a governmental capacity in so doing. The United States apparently takes the position that because an action of the State Bar may benefit the private interests of an attorney, such action is necessarily nongovernmental. Were this true, all unauthorized practice of law opinions would be private rather than governmental actions. Manifestly, any decision that conduct by a layman is the unauthorized practice of law benefits a private attorney.

Petitioners' arguments (Brief, p. 66) that the State Bar is an administrative agency of the Supreme Court for only "limited" purposes is unpersuasive for the same reason. Even if the Bar is a State agency for only limited purposes, it has manifestly acted in such a capacity in rendering opinions as to ethical conduct and in circulating suggested minimum fee schedules for the guidance of attorneys to enable them to comply with EC 2-18. The fact that private interests may be incidentaliy benefitted thereby does not detract from the governmental nature of the action.

Pursuant to § 54-48 of the Code, the Supreme Court of Virginia is authorized to adopt rules defining the practice of law and to adopt a code of ethics. It has delegated to the

State Bar the administration of these duties. The legislature of Virginia has, therefore, "directed" the activities forming the basis for this complaint.

C.

THE RELATIONSHIP BETWEEN MINIMUM FEE SCHEDULES AND ETHICS

The State Bar called as a witness in the trial of this case and qualified as an expert John D. Conner, who had served as chairman of the Committee on Economics of the Law Practice of the American Bar Association (A. 72). He testified as to his knowledge of the value of minimum fee schedules, knowledge acquired from many years in bar association activities.

Mr. Conner's testimony was from the point of view of the American Bar Association and the rules of that Association with respect to the use of minimum fee schedules by attorneys. As stated, however, by him, such rules insofar as they are relevant to their suit are the same as those found in the Supreme Court of Virginia's Code of Professional Responsibility. A pertinent provision is EC 2-18 which, as previously stated, in discussing the reasonableness of fees provides that suggested fee schedules along with other factors may be used as a guideline to determine reasonable fees. Additionally DR 2-106, in setting out in detail the factors to be considered to determine the reasonableness of a fee provides that the "fee customarily charged in the locality" is one of the eight factors to be taken into consideration.

Mr. Conner testified that a minimum fee schedule serves a number of useful purposes. Among them is that of an informational source as to the reasonableness of fees. It is helpful, particularly, to young lawyers who have no ap-

preciation of the nature of work which they are to undertake and can use the minimum fee schedule as a guideline as to what might reasonably be expected to be the magnitude of the job involved. Secondly, even for older attorneys, it proves helpful where they are asked to undertake legal work which did not fall into their normal areas of practice. Finally, such schedule can be of assistance as one indicator to a client who wishes to ascertain whether or not the fee quoted to him is a reasonable one.

More important is the fact that minimum fee schedules are used as a tool in the application of the Code of Professional Responsibility. As previously stated, the Code provides for suggested fee schedules to be a factor in the determination of a reasonable fee. It is important to recognize that ethical principles require that the fee be neither too high nor too low. As Mr. Conner testified, if the fee is too high, then, of course the client is paying more for the services than the value of the services received. On the other hand, if the fee is too low, the client and the public may be harmed, as well. Based upon Mr. Conner's experience, he testified that in those cases where attorneys habitually charged fees lower than the customary fees or minimum fee schedules in their area, there was a significantly greater likelihood of a misappropriation of a client's funds. In addition, where an attorney's fees are not adequate to provide him with the standard of living required to practice his profession, he will normally undertake to cut his expenses in such manners as by failing to continue his legal education or perhaps failing to keep his library up to date. It is clear, then, that the client and the public have an interest in seeing that the fee is neither too high nor two low.

Another ethical aspect of minimum fee schedules is with reference to the practice of "solicitation." It is with respect

to solicitation that opinions 98 and 170 (Exhibits 30 and 31; A. 45 and A. 47) were issued. The practice of charging lower than adequate fees in order to solicit legal business has been universally condemned by professional organizations for hundreds of years. It has been deemed to be in the public interest to regulate the practice of law in such a way as to insure high professional standards of competence. It has further been deemed that such end may best be served by prohibiting the utilization of the practices of the marketplace in the legal profession. If the relief requested by the plaintiffs were granted, there would in effect be no way in which the Virginia State Bar and the Supreme Court of Virginia, which have been charged by the General Assembly of Virginia with the responsibility of insuring high ethical standards in the practice of law in the Commonwealth, could prevent solicitation by attorneys. Clearly, the logic of the petitioners' argument would go beyond minimum fee schedules to cover any type of price regulation whatsoever. It is just this type of result which, it is submitted, dictates that the Sherman Act be deemed not to surplant the regulation of the ethical conduct of attorneys. It would simply be impossible for the legal profession to render the high level of service required by its Code of Professional Responsibility and at the same time to be bound by the Sherman Act which is designed to cover the practices of the marketplace.

II.

The Virginia State Bar In The Publication Of Minimum Fee Reports And The Rendering Of Ethical Opinions Acts In A Governmental Capacity And Thereby Enjoys The Sovereign Immunity Of The Commonwealth.[6]

The Eleventh Amendment to the Constitution of the United States reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens who are subjects of any foreign state." *U.S. Const. amend. XI.*

In *Hans* v. *Louisiana*, 134 U.S. 1 (1890), it was held that in the absence of waiver, actions against a state by a fellow citizen were prohibited as well as actions by citizens of different states. An early exception to this rule was created in *Ex Parte Young*, 209 U.S. 123 (1907), wherein the Court held that immunity did not extend to action being taken pursuant to an unconstitutional statute or action taken outside of the authority of the governmental agent in question, which exception is generally known as the *ultra vires* exception. There is no allegation that the Vir-

---

[6] Petitioners argue (Brief p. 24) that the issue of sovereign immunity is not before the Court because no cross-petition for certiorari was filed. This is erroneous. Even Petitioners concede that there was no ruling on the issue (*Id.* 24-25). Accordingly, no cross-petition would lie. Both lower courts (including the dissent) ruled in favor of the Bar on the statutory issues and had no need to reach the constitutional issue. *See Dandridge* v. *Williams*, 397 U.S. 471, 475 n. 6 (1970).

If this Court were to affirm the Court of Appeals, consideration of the sovereign immunity question would be unnecessary. If, however, it should reverse the decision below, it should decide this issue so as to enable the State Bar to avoid an unnecessary trial as to damages.

ginia State Bar was acting pursuant to an unconstitutional statute or outside of its authority.

Additionally, a state may waive its sovereign immunity *see e.g. Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964).[7] This Court has made clear, however, in two recent cases that any such waiver intended by Congress must be explicit. It will not be presumed to have acted silently. *See Employees of Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279 (1973); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Congress has not only failed to indicate that a state shall be deemed to have waived its sovereign immunity for purposes of the Sherman Act; but, as previously stated, as far back as 1895, it was ruled that a state was not a "person" within the meaning of the Sherman Act. The United States argues that the State Bar is not a state agency in "any relevant sense" (Brief, p. 47, n. 33). For the reasons previously stated it is submitted that the State Bar is the *alter ego* of the Supreme Court of Virginia with respect to matters delegated to it by the Court.

That the Virginia State Bar is an agency of the Commonwealth is not a position conveniently adopted for the purposes of this law suit. The Attorney General of Virginia ruled as far back as 1944, that the State Bar was a State agency. See Report of the Attorney General (1944-45), at p. 134 (App. I to Respondent's Brief). See also Report of the Attorney General (1959-60), at p. 375 (App. II to Respondent's brief).

Section 2.1-121 of the Code of Virginia (1950), as amended, requires representation by the Attorney General of *State* agencies. It does not permit the defense of private

---

[7] *But see, Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131, 135-136 (8th Cir. 1970).

individuals or entities. That the Virginia State Bar is a State agency has never been seriously questioned in Virginia.

The United States argues (Brief, p. 47) that since judgment against the State Bar would be against its own funds, there would be no judgment against the State for purposes of the Eleventh Amendment. This manifests a lack of knowledge of methods of financing government in the Commonwealth. While many State agencies receive appropriations from the State Treasury, many others are financed entirely through "special funds," *i.e.*, monies raised specifically for such agencies. Such monies are not part of the general funds, but they are no less funds of the Commonwealth since expenditures from those funds are regulated by State law. Examples of such agencies are the Virginia Department of Highways and Transportation, the Virginia Employment Commission, the Virginia Alcoholic Beverage Control Board, the Industrial Commission of Virginia—and the Virginia State Bar. Such a financing system represents simply another way of providing funds for State operations. Indeed, the Attorney General has ruled that the funds collected by the Bar are "appropriated" by the State. See Report of the Attorney General (1938-39), at p. 299 (App. III to Respondent's brief).

In sum petitioners would have the Court hold that the State Bar has violated the Sherman Act and is therefore liable in treble damages where it has rendered ethical opinions as authorized by statute and required by the Supreme Court of Virginia as the Court's administrative agency and where it has provided suggested minimum fee schedules for the guidance of attorneys to enable them to comply with the Code of Professional Responsibility adopted by the Supreme Court of Virginia. As District Judge Bryan said below:

"Insofar as damages are concerned, it is stipulated that the Virginia State Bar is an administrative agency of the Supreme Court of Virginia. Aside from any Eleventh Amendment considerations, such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15." (App. A, p. 6).

CONCLUSION

For the reasons previously stated the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

VIRGINIA STATE BAR
By: STUART H. DUNN

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Deputy Attorney General

STUART H. DUNN
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219